

1
2
3
4
5

6 IN THE UNITED STATES DISTRICT COURT

7
8
9

FOR THE NORTHERN DISTRICT OF CALIFORNIA

10
11
12
13
14
15

CHARLES WILIAMS,

No. C 10-4277 WHA (PR)

Petitioner,

**ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS; DIRECTING
PETITIONER TO MAKE
ELECTION; DENYING MOTION
FOR STAY**

v.

MATTHEW CATE,

Respondent.

(Docket Nos. 9 & 11)

16

INTRODUCTION

17
18
19
20
21
22

This is a habeas case filed pro se by a state prisoner. Respondent has responded to the order to show cause with a motion to dismiss the petition as a “mixed” petition containing both exhausted and unexhausted claim. Petitioner has not filed an opposition, but has rather filed a motion to file “amended and supplemental info,” in which he requests that this case be stayed while he exhausts additional claims. Respondent has filed a reply brief. For the reasons discussed below, the motion to dismiss the petition

23

STATEMENT

24
25
26
27
28

Pursuant to a conviction in 2007 in Santa Clara County Superior Court, petitioner was sentenced to a term of 45 years to life plus 12 years in state prison. The California Court of Appeal affirmed the judgment, and the California Supreme Court denied a petition for review. Petitioner filed unsuccessful habeas petitions in the superior court and the California Court of Appeal, but he did not file a habeas petition in the California Supreme Court.

1 ANALYSIS

2 Petitioner presents four claims in his petition: (1) he received ineffective assistance of
3 counsel at trial; (2) he was unable to present evidence challenging the credibility of the victim,
4 in violation of his right to present favorable evidence and to confront adverse witnesses; (3) he
5 did not receive a fair trial because of the exclusion of evidence challenging the testimony of an
6 expert witness; and (4) the trial court “abused its discretion” by not allowing the defense to
7 present evidence that the expert was biased. Respondent was ordered to show cause on these
8 issues, and was permitted to address claims three and four jointly as they are related.

9 Respondent argues that petitioner has not exhausted the first, third and fourth claims.
10 An application for a federal writ of habeas corpus filed by a prisoner who is in state custody
11 pursuant to a judgment of a state court may not be granted unless the prisoner has first
12 exhausted state judicial remedies, either by way of a direct appeal or in collateral proceedings,
13 by presenting the highest state court available with a fair opportunity to rule on the merits of
14 each and every issue he or she seeks to raise in federal court. *See* 28 U.S.C. § 2254(b),(c);
15 *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987).

16 Here, petitioner presented claims in the California Supreme Court only in his petition for
17 direct review; he did not file a habeas petition there. His petition for direct review did not raise
18 his first claim, of ineffective assistance of counsel, but did include his second claim regarding
19 the presentation of evidence of the victim. The petition for direct review does include a claim
20 that addresses the issues raised in the third and fourth claims herein, but the petition only asserts
21 a violation of state law, not of federal law. As such, it does not exhaust the third and fourth
22 claims. *See Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc) (claim is
23 “fairly presented” for purposes of exhaustion only if petitioner either referenced specific
24 provisions of federal constitution or federal statutes, or cited to federal or state case law
25 analyzing federal issue). Petitioner does not dispute any of the foregoing, or indeed that his
26 first, third and fourth claims are unexhausted.

27 Where, as here, a petition combines exhausted and unexhausted claims, it may be (1)
28 dismissed outright, *Rose v. Lundy*, 455 U.S. 509, 522 (1982), *Guizar v. Estelle*, 843 F.2d 371,

1 372 (9th Cir. 1988); (2) dismissed with leave to amend to delete the unexhausted claims and
2 proceed with only the exhausted claims, *Anthony v. Cambra*, 236 F.3d 568, 574 (9th Cir. 2000);
3 or (3) it may be stayed to allow the petitioner to return to state court to exhaust the unexhausted
4 issue or issues, *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005).

5 In his motion responding to the motion to dismiss, petitioner requests a stay so that he
6 can exhaust his unexhausted claims in the California Supreme Court. In order to obtain a stay, a
7 petitioner must show good cause for his failure to exhaust the claim before filing the petition,
8 and that the claim is “potentially meritorious.” *Id.* at 277. Petitioner asserts that the reason he
9 did not exhaust his claims earlier was because he does not have legal training and he was
10 relying on his appointed counsel on direct appeal and an inmate assistant to file his state habeas
11 petitions, both of whom neglected to raise these claims in the California Supreme Court.
12 Counsel’s failure to include claims on appeal in the state courts does not establish “good cause”
13 to grant a pro se petitioner’s request to stay a mixed federal petition under *Rhines*, however.
14 *Wooten v. Kirkland*, 540 F.3d 1019, 1024 (9th Cir. 2008). Petitioner’s incorrect “impression”
15 that the claims had been raised does not alter this conclusion. *Ibid.* (upholding denial of stay
16 because petitioner’s incorrect “impression” that counsel had raised claims to the California
17 Supreme Court on direct appeal did not establish good cause under *Rhines* for failure to exhaust
18 claims earlier). As petitioner has not established good cause for failing to exhaust his first, third
19 and fourth claims prior to filing the instant petition, he is not entitled to a stay of the instant
20 petition in order to exhaust them.

21 Petitioner also requests a stay in order to exhaust a new claim -- that he has new
22 evidence establishing his innocence of the charges. Such a claim is not “potentially
23 meritorious” under *Rhines*, however. “Claims of actual innocence based on newly discovered
24 evidence have never been held to state a ground for federal habeas relief absent an independent
25 constitutional violation occurring in the underlying state criminal proceeding.” *Herrera v.*
26 *Collins*, 506 U.S. 390, 400 (1993). Although the Ninth Circuit has twice assumed that a claim
27 of actual innocence is cognizable in a non-capital habeas case, it has not actually found such a
28 claim is cognizable in a non-capital habeas case under 28 U.S.C. 2254. See *Osborne v. District*

1 *Attorney's Office*, 521 F.3d 1118, 1130-31 (9th Cir. 2008), *rev'd and remanded on the grounds*,
 2 129 S. Ct. 2308 (2009); *United States v. Berry*, 624 F.3d 1031, 1038 n.5 (9th Cir. 2010) (noting
 3 that Ninth Circuit "recognizes a claim of actual innocence that is cognizable under [28 U.S.C.] §
 4 2255"). In any event, federal habeas relief must be based upon federal law that is clearly
 5 established by the United States Supreme Court, and may not be premised only upon law
 6 decided by the circuit courts. *See* 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362,
 7 412. As the Supreme Court has decided that a claim of innocence based on new evidence has
 8 not been recognized as a basis of federal habeas relief, under *Rhines*, he may not obtain a stay in
 9 order to exhaust such a claim.

CONCLUSION

11 1. Respondent's motion to dismiss (document number 9) is **GRANTED**. Petitioner's
 12 motion seeking a stay (document number 11) is **DENIED**.

13 2. Petitioner may chose from two possible courses of action.

14 a. First he may file a notice that he wants to dismiss this case, so that he can
 15 exhaust his unexhausted claims and then later file a new federal petition. He is cautioned that
 16 this option is more apparent than real, because any subsequent federal petition would almost
 17 certainly be barred by the statute of limitations. *See* 28 U.S.C. 2244.

18 b. Alternatively, he may file an amended petition deleting the three
 19 unexhausted claims (one, three and four) and asserting only the exhausted claim (two).¹ He is
 20 cautioned that if he chooses this option he probably will not be able to file a future federal
 21 petition containing the three unexhausted claims because second federal petitions are generally
 22 barred by 28 U.S.C. 2244(b)(2). If he does choose this option, the amended petition must be on
 23 the court's form for prisoner Section 2254 petitions and must include the caption and civil case
 24 number used in this order (No. C 10-4277 WHA (PR)) and the words AMENDED PETITION
 25 on the first page.

26 3. Petitioner must elect one of the two choices set out above **within thirty days of**

27
 28 ¹ If he chooses this option he probably will not be able to file a future federal petition
 containing the plea bargain issue, because second federal petitions are generally barred by 28
 U.S.C. § 2244(b)(2).

1 the date this order is filed. If he does not, this case will be dismissed without prejudice.

2 **IT IS SO ORDERED.**

3
4 Dated: June 13, 2011.

Wm. Alsup

5
6
7
8
9
10
11 WILLIAM ALSUP
12 UNITED STATES DISTRICT JUDGE
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

G:\PRO-SE\WHA\HC.10\WILLIAMS4277.MTDMIX.wpd